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No. 92-566

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

MARK BARNES,

Petitioner,

v.

WESTINGHOUSE ELECTRIC CORPORATION, WESTINGHOUSE ELECTRIC SUPPLY COMPANY and/or WESCO DALLAS and/or WESCO, a division of or wholly-owned subsidiary of WESTINGHOUSE ELECTRIC CORPORATION,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether statutory limits on removal jurisdiction, including the bar to removal of diversity cases that have been pending for more than one year in 28 U.S.C. § 1446(b), are waived under 28 U.S.C. § 1447(c) if not raised within thirty days after removal.

2. Whether, if the thirty-day deadline for remand motions applies in this case, petitioner satisfied this requirement by filing a timely motion that stated the factual but not the legal basis for a remand.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 962 F.2d 513, and reprinted in Pet. App. A. The orders of the United States District Court for the Northern District of Texas are unreported and reprinted in Pet. Apps. B, C and D.

JURISDICTION

The Court of Appeals entered judgment on June 8, 1992, and denied a timely petition for rehearing on July 8, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1446(b) provides:

> (b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 U.S.C. § 1447(c) provides:

> (c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

STATEMENT

This is a diversity case that was removed to federal court more than three years after it was filed in state

court.[1] The removal was improper under 28 U.S.C. § 1446(b), which prohibits removal on diversity grounds after a case has been pending for one year. The United States Court of Appeals for the Fifth Circuit nevertheless held that petitioner, the plaintiff below, had waived this issue by failing to file a remand motion based on section 1446(b) within thirty days of the removal. It treated the violation of the one-year bar to removal of diversity cases as a "defect in removal procedure" that must be raised within thirty days under 28 U.S.C. § 1447(c). Petitioner seeks review of this ruling because it conflicts not only with a proper reading of the removal statutes but also with the large majority of decisions on point from other federal courts.

In this case, petitioner Mark Barnes seeks damages for severe burns he suffered when he came into contact with a high-voltage "bus duct" manufactured by respondent Westinghouse Electric Corp. during work on renovations at the Dallas/Fort Worth Airport. Petitioner, a resident of Texas, filed suit in 1985 in a Texas state court against Westinghouse and various other defendants, including a Texas corporation. Other defendants were added later. On December 14, 1988, petitioner voluntarily dismissed the last remaining Texas defendant. On January 12, 1989, respondents removed the case to federal district court, based on diversity of citizenship. On January 27, 1989, petitioner filed a motion to remand the case to state court.

This removal and request for remand occurred only weeks after the effective date of the Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (signed into law on November 19, 1988). In that Act, Congress amended 28 U.S.C. § 1446(b) to provide that "a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title [diversity jurisdiction] more than 1 year after commence-

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[1] The caption includes all parties in the court below.

ment of the action." Pub. L. No. 100-702, 102 Stat. 4669. The removal of this case was thus plainly illegal.

Because counsel for petitioner were unaware of the new statute, however, the original remand motion did not refer to the one-year bar to removal. Instead, while noting that the case had been pending in state court for more than three years and was about to go to trial, petitioner relied on pre-1988 law—arguing that respondents waived their right to seek removal by waiting four weeks after diversity had been created and, in the interim, by seeking affirmative relief from the state court on a discovery matter. The district court, apparently equally unaware of the statutory change, decided that it had removal jurisdiction and denied the remand motion on February 9, 1989. Pet. App. 24a.

On September 21, 1990, while respondents' motion for summary judgment remained pending in district court, petitioner filed a "Motion for Rehearing on Motion to Remand," relying on the one-year bar in the amended section 1446(b) and arguing that it is jurisdictional in nature. The district court denied this motion, holding that the one-year limitation is not jurisdictional and that petitioner had waived his right to seek a remand on this ground by failing to raise it within thirty days of the removal petition. Pet. App. 21a-22a.

This thirty-day requirement was drawn from another change made in the Judicial Improvements and Access to Justice Act, which amended 28 U.S.C. § 1447(c) to provide as follows:

> A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

While noting that petitioner had filed an original remand motion within thirty days, raising the factual if not the

legal basis for a remand, the district court treated the rehearing motion as a new remand request. It held that this later request was untimely, based on its determination that respondents' violation of the one-year bar to removal was a waivable "defect in removal procedure" governed by the thirty-day deadline for remand motions. Pet. App. 20a-21a.

On February 8, 1991, the district court granted summary judgment on the merits for respondents. Pet. App. 11a-17a. Petitioner appealed to the United States Court of Appeals for the Fifth Circuit, challenging both the court's failure to remand the case and its grant of summary judgment. The court of appeals affirmed. On the removal issue, the court drew a distinction between "removal jurisdiction" and "subject matter jurisdiction." It held that the thirty-day deadline for remand motions in section 1447(c) applies to all challenges that do not involve the latter issue—*i.e.*, that do not "go to the question of whether the case originally could have been brought in federal district court." Pet. App. 6a. In the court's view, since the one-year bar to removal of diversity cases only involves a limitation on *removal*, a remand motion based on this bar is waived unless made within the thirty-day deadline.

REASONS FOR GRANTING THE WRIT

This petition raises an important and recurring issue on which the lower federal courts are squarely in conflict. That issue is whether the thirty-day filing deadline for remand motions based on "defect[s] in removal procedure" (added to section 1447(c) in 1988) applies to motions relying on statutory prohibitions against removing specific categories of cases. Such statutory prohibitions include not only the bar to removal on diversity grounds in cases that have been pending more than a year, 28 U.S.C. § 1446(b), but also the bar to removal in diversity cases by defendants who reside in the forum

state, *id.* § 1441(b), and the bar to removal of cases involving the Federal Employer's Liability Act, the Jones Act, or workers compensation, *id.* §§ 1445(a), (c). Petitioner takes the view that when removing defendants ignore these kinds of mandatory limitations on the removal jurisdiction of the federal courts, the resulting challenge does not involve a "defect in removal procedure" and thus is not covered by the thirty-day filing deadline.[2]

The Fifth Circuit, however, has established a flat rule that the thirty-day filing deadline for remand motions applies to all removal challenges that do not question the federal court's "original" jurisdiction to hear the case if it had been filed in federal court from the outset. Applying that rule here, the court held that the illegality of the removal of this diversity case more than three years after its filing became a moot point when it was not raised by petitioner within thirty days. Two district courts outside the Fifth Circuit have adopted the same reasoning.

The Fifth Circuit's finding of waiver in this case warrants review by this Court for several compelling reasons. First, it is based on a highly strained reading of the statutory phrase "defect in removal procedure." That phrase is most naturally read as referring to procedural defaults committed by defendants in the course of seeking removal—matters that sensibly are treated as waived

[2] It is well established that a denial of remand is reviewable on appeal where, as here, the district court later enters a final judgment. *See* 14A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3740, at 596-97 (1985) (citing cases). The necessary import of this rule is that a reversal on the remand issue voids the subsequent final judgment. Here, petitioner challenged both the denial of remand and the summary judgment on appeal. Thus, although petitioner does not seek review on the fact-specific summary judgment issue, if he were to prevail in this court, the result would be a remand to the Fifth Circuit directing that court to vacate its affirmance of the summary judgment. The Texas courts would then consider the merits *de novo*. *See Seeligson's Ex'rs v. Texas Transp. Co.*, 7 S.W. 708 (Tex. 1888).

if not raised immediately. The one-year bar to removal in section 1446(b), by contrast, is an unconditional prohibition addressed not to the procedural obligations of defendants but to the power of the federal court to hear the case. Indeed, this rule generally comes into play only where, as here, defendants have sought removal at their earliest opportunity—*i.e.*, as soon as complete diversity was created in state court.

In addition, the Fifth Circuit's rule has been squarely rejected by the large majority of courts outside the Fifth Circuit that have addressed this issue. Thus, six district courts have interpreted section 1446(b) as imposing a *jurisdictional* limitation on the power of a federal court to accept a diversity case that has been pending in state court for more than a year. They have accordingly held that this issue is controlled by the second sentence of section 1447(c), requiring that a remand based on a lack of "subject matter jurisdiction" be ordered "at any time before final judgment." At least four other district courts have adopted the same approach with respect to other statutory limitations on removal.

Yet a third approach, also inconsistent with the Fifth Circuit's rule, has been followed by the Third and Eighth Circuits in cases involving remands based, respectively, on a forum-selection agreement and abstention. These courts have held that there are some bases for remand that simply are not addressed in section 1447(c) because they involve *neither* defects in removal procedure nor jurisdiction. They have concluded that the thirty-day filing deadline does not apply to remand motions in this third category. Under this approach, section 1447(c) might also be read as omitting any reference to statutory limits on removal like the one at issue here—if such limits are deemed to involve neither defective removal "procedure" nor "subject matter jurisdiction."

This Court should act now to eliminate the abundant confusion over the proper interpretation of section 1447(c). While there is, as yet, no direct inter-*circuit*

conflict on the specific question presented here, that fact does not argue against a grant of review in this particular context. The lower federal courts face the issue frequently, and obviously are having great difficulty in arriving at a consensus. Moreover, even though the issue arises repeatedly in the district courts, it may be years before other circuits have an opportunity to address it. The reason is that relatively few decisions on remand motions (for legal and practical reasons) are ever subject to appellate review. In particular, a district court ruling *granting* a remand—including any such ruling based on perceived "jurisdictional" grounds—may not be reviewed on appeal. 28 U.S.C. § 1447(d). The Court should therefore take this opportunity to clarify the meaning of these important federal statutes governing access to federal court.[3]

1. As we have noted, the statutes authorizing removal of cases to federal court contain a number of specific limitations on removal. *See, e.g.*, 28 U.S.C. §§ 1441(b), 1445. This Court has indicated that the removal statutes must be strictly construed, explaining that the "power reserved to the states under the Constitution to provide for the determination of controversies in their courts . . . may be restricted only by action of Congress," and that "'[d]ue regard for the rightful independence of state

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[3] Petitioner also presents a second question for review, which would arise only if the Court ultimately accepted the Fifth Circuit's position on the main question. That second issue is whether, even under the Fifth Circuit's interpretation of sections 1446(b) and 1447(c), petitioner preserved his claim by filing, within thirty days, a remand motion that presented the factual if not the specific legal basis for a remand. (As noted above, petitioner's first remand motion did note that the case had been pending in state court for three years, while making a somewhat different timeliness argument under pre-1988 law.) While we do not argue that this second issue is independently worthy of review here, it involves the application of the same statutory provisions as the first question and, therefore, it would make sense to consider this issue as well if the Court chooses to address the first question.

governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' " *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941). The Court has thus rejected efforts to broaden the scope of removal jurisdiction beyond what Congress has expressly authorized. *See, e.g., id.; International Primate Protection League v. Administrators of Tulane Educ. Fund*, 111 S. Ct. 1700, 1705-10 (1991).

In this case, the basic question is whether Congress, in the Judicial Improvements and Access to Justice Act, enacted a rule effectively abrogating the statutory limits on removal jurisdiction in any case where the plaintiff fails to raise an objection within thirty days. The Fifth Circuit has adopted the position that the thirty-day filing requirement for "defect[s] in removal procedure" applies to all removal challenges except those that question the court's "original" jurisdiction—*i.e.*, its power to have entertained the case if it had been filed originally in federal court. *See* Pet. App. 6a; *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1542-46 (5th Cir.) (objection to removal in maritime case based on "savings to suitors" clause, 28 U.S.C. § 1331(1), is waived if not raised within thirty days) ("[T]he word 'procedural' in section 1447(c) refers to any defect that does not involve the inability of the federal district court to entertain the suit as a matter of its original subject matter jurisdiction."), *cert. denied*, 112 S. Ct. 430 (1991); *In re Shell Oil Co.*, 932 F.2d 1518, 1521-23 (5th Cir. 1991) (objection to removal in diversity case based on fact that removing defendant is a citizen of the forum state is waived if not raised within thirty days), *cert. denied*, 112 S. Ct. 914 (1992). This rule means that, where a case is improperly removed in the face of a statutory prohibition but the plaintiff fails to complain within thirty days, the district court need not —indeed may not—remand the case in an effort to respect the limits on its removal jurisdiction. *See FDIC v. Loyd*, 955 F.2d 316, 322 (5th Cir. 1992) (district

courts may not *sua sponte* remand cases, after thirty days, based on grounds falling into the category of "defect[s] in removal procedure").

Here, for example, Congress mandated in the Judicial Improvements and Access to Justice Act that cases "may not be removed" to federal courts on the basis of diversity "more than 1 year after commencement of the action."[4] This "modest curtailment in access to diversity jurisdiction," H.R. Rep. No. 889, 100th Cong., 2d Sess. 72 (1988), comes into play chiefly when, as in this case, complete diversity arises after a case has been pending in state court for more than a year (*i.e.*, through dismissal of non-diverse defendants).[5] Congress concluded that "[r]emoval late in the proceedings may result in substantial delay and disruption." *Id.*

The Fifth Circuit held, however, that the illegality of the removal effected by respondents, in a case that had been pending for more than three years, was a mere "defect in removal procedure" that was waived when not specifically raised within thirty days. In so doing, it recognized that section 1447(c), as amended in 1988, mandates a remand "at any time before final judgment [where] it

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[4] Congress in this act enacted a number of reforms aimed at dealing with what was viewed as a "torrent of litigation" in the federal courts. H.R. Rep. No. 889, 100th Cong., 2d Sess. 23 (1988). One key element was an effort to limit the flow of diversity cases to federal courts. Thus, in addition to barring removal of diversity cases that were pending more than a year, Congress raised the amount in controversy required for diversity cases to $50,000. *See* 28 U.S.C. § 1332(a).

[5] In cases where diversity exists from the start, the one-year rule generally has no effect. In such cases, section 1446(b) already required defendants to seek removal within thirty days after service of the complaint. This requirement, however, is waivable. *See* note 6 *infra*. Thus, the one-year bar might play a role in this kind of case, if the defendant has waited more than a year to seek removal, if the plaintiff has failed to raise the timeliness issue, and if the bar is construed as a jurisdictional limitation and that cannot be waived.

appears that the district court lacks *subject matter jurisdiction*." (Emphasis added.) *See* Pet. App. 4a n.6. But it viewed this provision as applicable only to limitations affecting the court's original jurisdiction (where, for example, there is no federal question and no diversity of citizenship), and thus inapplicable to any limits solely involving the scope of "removal jurisdiction." *Id.* at 6a.

2. On the merits, this interpretation of section 1447(c) is highly problematic. In a case like this one, involving a removal effected in violation of an unconditional statutory prohibition, it is at least doubtful that Congress would have barred a court from enforcing the prohibition simply because the plaintiff failed to assert it immediately after the removal occurred. It is even more doubtful that, if Congress wanted to accomplish that result, it would have done so by using the phrase "defect in removal *procedure*." As a matter of simple English, it is difficult to see how there has been a "defect in removal procedure" in a case where the removing defendant has followed every applicable procedural requirement, but the removal is simply illegal.

It is far more plausible to read this phrase as applicable solely to procedural missteps made by defendants in the course of seeking removal—such as filing defective removal papers or waiting to file for removal more than thirty days after receipt of the state-court complaint. These kinds of technical or formal defects have long been viewed as waivable by plaintiffs. *See, e.g., Ayers v. Watson*, 113 U.S. 594, 598 (1885) ("We see no reason, for example, why the other party may not waive the required bond, or any informalities in it, or informalities in the petition, provided it states the jurisdictional facts . . . ."). Moreover, it makes sense to believe that Congress would have wanted these kinds of issues to be raised immediately or put aside.[6]

[6] There is no doubt that the thirty-day deadline for remand motions applies *at least* to all removal challenges based on purely

Under this interpretation of section 1447(c), mandatory limits on removal jurisdiction would be treated in one of two ways. They might be viewed as falling within the scope of the second sentence of section 1447(c), which mandates a remand at any time prior to final judgment if it is determined that the court lacks "subject matter jurisdiction." As we note below, this is the approach adopted by the majority of federal courts that have faced this question.

Alternatively, the section might be read as being simply silent on the appropriate treatment of removal challenges based on statutory limitations on removal jurisdiction. *Cf. Melahn v. Pennock Ins., Inc.*, 965 F.2d 1497, 1503 (8th Cir. 1992) (refusing to apply the thirty-day filing

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procedural defects, such as a failure to seek removal within thirty days after service of a state-court pleading that reveals a basis for removal, as required by section 1446(b). *See, e.g., Nolan v. Boeing Co.*, 919 F.2d 1058, 1063 n.6 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1587 (1991); *Air-Shields, Inc. v. Fullam*, 891 F.2d 63, 65 (3d Cir. 1989). The Fifth Circuit here held, in effect, that the one-year bar to removal of diversity cases should be treated as equivalent to the general thirty-day filing deadline for all removal notices. Yet the differences between these two statutory requirements only serve to illustrate further the reasons why the one-year bar should not be viewed as involving a "defect in removal procedure" that the plaintiff must raise immediately under section 1447(c). *See Perez v. General Packer, Inc.*, 790 F. Supp. 1464, 1470 (C.D. Cal. 1992); *Foiles v. Merrell Nat'l Lab.*, 730 F. Supp. 108, 110 (N.D. Ill. 1989). The general thirty-day deadline for all removal notices, after all, is phrased as a procedural obligation imposed on the defendant in the course of seeking removal. *See* 28 U.S.C. § 1446(b) (providing that the notice of removal shall be "*filed* within thirty days" of an initial pleading or some other event establishing a basis for removal) (emphasis added). By contrast, the one-year bar does not involve the *process* for removal and is not phrased in terms of the procedural obligations of defendants seeking removal. Indeed, this bar is a flat prohibition that is principally addressed to a situation where a defendant has made no procedural misstep whatever—*i.e.*, where the basis for removal on diversity grounds arises more than one year after the case was filed and the defendant then seeks immediate removal.

rule to a remand motion made on abstention grounds) ("The plain meaning of 'procedural defect' would seem to exclude abstention."); *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1215 (3d Cir.) (refusing to apply the thirty-day filing rule to a remand motion based on a forum selection agreement) ("Section 1447(c) neither prohibits nor authorizes the order of remand here, based on a forum selection clause. It simply does not address the issue."), *cert. denied*, 112 S. Ct. 302 (1991).[7] This reading would leave in place the pre-1988 law on waiver of this category of challenges. Under this earlier case law, in a case where there was no removal jurisdiction but there was "original" jurisdiction (such as diversity or a federal question), it was clear that a plaintiff could not raise the issue for the first time on appeal. *Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699 (1972). But prior to final judgment in the district courts, statutory limits on removal jurisdiction were frequently (although not universally) enforced despite the absence of an objection by the nonremoving party.[8]

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[7] *See also Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 354-55 & n.11 (1988) (discussing the pre-1988 version of section 1447(c)) (section does not address courts' inherent power to remand pendent claims).

[8] *See, e.g., Hoyt v. Sears, Roebuck & Co.*, 130 F.2d 636, 637 (9th Cir.) (remand required where plaintiff improperly removed based on defendant's counterclaim, despite defendant's acquiescence), *cert. denied*, 317 U.S. 687 (1942); *Coogan v. DeBoer Properties Corp.*, 354 F. Supp. 1058, 1059 (S.D. Tex. 1973) (remand required where less than all defendants sought removal despite acquiescence of plaintiffs); *Resident Advisory Bd. v. Tate*, 329 F. Supp. 427, 432 (E.D. Pa. 1971) (remand required where less than all defendants sought removal; nonremoving defendants cannot waive this fundamental jurisdictional issue); *Moltke v. Intercontinental Shipping Corp.*, 86 F. Supp. 662 (S.D.N.Y. 1949) (court ordered remand of improperly removed Jones Act case on its own motion). *Cf. FSLIC v. Quinn*, 419 F.2d 1014, 1017 (7th Cir. 1969) (objection to removal based on fact that state court never had valid jurisdiction is not waivable even though federal court would have had original jurisdiction over the case); *American Oil Co. v. Egan*, 357 F. Supp. 610,

In sum, a fair reading of the actual language of section 1447(c), as amended in 1988, does not justify the conclusion that Congress intended to require courts to ignore the limits on their removal jurisdiction whenever the removal went unchallenged for thirty days. If Congress had intended this rather dramatic result, it would certainly have said so. It chose instead to apply the thirty-day filing deadline solely to remand motions based on "defect[s] in removal procedure"—a phrase that was at best an odd choice if it was meant to encompass unconditional limitations on the power of courts to entertain particular categories of cases.

3. In any event, it is clear that this Court needs to address the issues raised here, because the lower federal courts lack sufficient guidance as to the applicable legal principles. The Fifth Circuit's holding that the one-year bar to removal of diversity cases must be raised within thirty days is supported by two district court decisions from other circuits. *See Leidolf v. Eli Lilly & Co.*, 728 F. Supp. 1383, 1388 (E.D. Wis. 1990); *Gray v. Moore Business Forms, Inc.*, 711 F. Supp. 543, 545 (N.D. Cal. 1989). But it has been rejected by the majority of district courts outside the Fifth Circuit that have faced this issue. *See Brock v. Syntex Lab., Inc.*, 791 F. Supp. 721, 722-23 (E.D. Tenn. 1992); *Perez v. General Packer, Inc.*, 790 F. Supp. 1464, 1469-71 (C.D. Cal. 1992); *McNaught v. Avis Rent a Car Systems, Inc.*, 1992 U.S. Dist. LEXIS 8 (N.D. Ill. Jan. 2, 1992); *Foiles v. Merrell Nat'l Lab.*, 730 F. Supp. 108, 109-11 (N.D. Ill. 1989); *Smith v. MBL Life Assur. Corp.*, 727 F. Supp. 601, 602-04 (N.D. Ala. 1989); *Strickland v. A.P. Propane, Inc.*, 721 F. Supp. 284, 285-86 (M.D. Fla. 1989). *See also Molden v. Fire-*

613-14 (D. Minn. 1973) (remanding case after 15 months that had been improperly removed based on counterclaim, taking into account absence of injury to removing party). *But see, e.g., Lirette v. N.L. Sperry Sun, Inc.*, 820 F.2d 116, 118 (5th Cir. 1987) (*en banc*) (*dictum*) (where Jones Act case improperly removed, participation by plaintiff in federal proceedings may amount to a waiver).

stone Tire & Rubber Co., 754 F. Supp. 521, 523 (M.D. La. 1990) (adopting the same view in *dictum* prior to the decision below).

These courts have viewed the one-year bar in section 1446(b) as a jurisdictional limitation on their power to accept removal—a limitation that is not waived thirty days after removal and, indeed, must be raised *sua sponte* by the federal court. In so ruling, they have relied on the plain language of section 1446(b), which imposes an unconditional prohibition on removal of this category of diversity cases. *See, e.g., Brock v. Syntex Lab., Inc.*, 791 F. Supp. at 722-23 (statute imposes a "blanket prohibition on removal of diversity cases more than one year after commencement"); *Foiles v. Merrell Nat'l Lab.*, 730 F. Supp. at 110 ("[T]he Court believes that to rule otherwise would disregard the plain language of § 1446(b) . . . . The effect would be to rewrite the statute to read: 'A case may not be removed . . . more than 1 year after the commencement of the action, unless it is removed and the adverse party fails to file a timely motion to remand pursuant to § 1447(c).'").

The courts rejecting the Fifth Circuit's approach have also found support in the legislative history, which evinces an intent to impose a "substantive limit on diversity jurisdiction." *Foiles v. Merrell Nat'l Lab.*, 730 F. Supp. at 110 (citing H.R. Rep. No. 889, 100th Cong., 2d Sess. 72 (1988)). *See also Brock v. Syntex Lab., Inc.*, 791 F. Supp. at 723; *Strickland v. A.P. Propane, Inc.*, 721 F. Supp. at 286. Finally, they have noted that allowing waiver of this limitation would encourage abuse. *See Brock v. Syntex Lab., Inc.*, 791 F. Supp. at 723 (such a rule "would encourage defendants to remove cases . . . and hope that the plaintiff had failed to timely move to remand"); *Perez v. General Packer, Inc.*, 790 F. Supp. at 1470 (rule would encourage defendants to ignore the one-year limit and "wager that the plaintiff will not detect the statutory violation within 30 days"); *Foiles v. Merrell Nat'l Lab.*, 730 F. Supp. at 110 ("If the Court accepted

[defendant's] view, litigants who abided the statute's prohibition against removal would have nothing to gain; it would always be best to remove and hope the other side failed to file a timely motion to remand.").

As we have noted, the Fifth Circuit also applies the thirty-day filing requirement in section 1447(c) in cases involving other statutory limits on removal jurisdiction. Here again, however, a number of other courts have disagreed. Thus, two recent decisions hold that the acquiescence of the plaintiff does not relieve the court of its obligation to remand a case, at any time prior to final judgment, that was removed on diversity grounds by a citizen of the forum state in violation of section 1441(b). *Ostrowitz v. Eli D. Albert, P.C.*, 1991 U.S. Dist. LEXIS 15470 (S.D.N.Y. Oct. 30, 1991); *National W. Life Ins. Co. v. Fischer*, 722 F. Supp. 554, 555 (E.D. Wis. 1989). Indeed, in *Ostrowitz*, the court explicitly rejected the Fifth Circuit's holding in *Shell Oil*, *supra*, that such a violation constitutes a defect in "procedure" waivable if not raised within thirty days under section 1447(c). 1991 U.S. Dist. LEXIS at *2-*3. It held that the violation "is surely more than a defect in procedure: 28 U.S.C. § 1441(b) represents a Congressional determination as to what cases may, and may not, be removed." *Id.* at *3 (citing *Smith v. MBL Life Assur. Corp.*, *supra*). The court refused to conclude that section 1447(c) "was intended to require district courts to accept jurisdiction of cases removed contrary to statute simply because counsel may have been remiss in their obligations." *Id. See also National W. Life Ins. Co. v. Fischer*, 722 F. Supp. at 555 n.1 (citing the "court's duty to remand a case to state court when jurisdiction is lacking because removal is improper").

Other courts, dealing with other statutory limitations on removal, have followed similar reasoning. *See Montalvo Santiago v. Resolution Trust Corp.*, 779 F. Supp. 632, 636 (D.P.R. 1991) (statutory requirement that RTC

seek removal within 90 days after substitution as a party, 12 U.S.C. § 1441a(*l*)(3)(A), is mandatory and not a defect in removal procedure, and thus not covered by section 1447(c)); *Patient Care, Inc. v. Freeman*, 755 F. Supp. 644, 646 n.3 (D.N.J. 1991) (holding that a third-party defendant facing an indemnity claim based on federal law lacks the right to seek removal under section 1441(c)) ("Because defendants' objection to removal is based on an alleged jurisdictional defect, they have not waived their objections by failing to seek remand earlier in the proceedings."); *Blackmore v. Rock-Tenn Co.*, 756 F. Supp. 288, 289 (N.D. Tex. 1991) (remanding, probably in contravention of prevailing Fifth Circuit law, a diversity case involving workers' compensation under section 1445(c)) ("The court may *sua sponte* remand an improperly removed action even after expiration of the thirty-day period that 28 U.S.C. § 1447(c) sets forth for filing motions to remand.").

Finally, as we have noted, the Fifth Circuit's rule—applying the thirty-day deadline in section 1447(c) to all removal challenges that do not involve original jurisdiction—was specifically rejected by the Third and Eighth Circuits in yet another context. In *Foster v. Chesapeake Ins. Co.*, *supra*, the Third Circuit held that this deadline did not apply to a remand motion based on a forum-selection clause. The defendant had argued that the term "defect in removal procedure" in section 1447(c) applies to "all non-jurisdictional motions for remand," including those based on forum-selection agreements. 933 F.2d at 1213. The court rejected this interpretation as contrary to the plain language of the statute. *Id.*[9] It concluded

[9] The court also noted that the legislative history refers to at least one non-jurisdictional basis for a remand that is not governed by the thirty-day deadline—*i.e.*, when " 'disposition of all federal questions leaves only State law questions that might be decided as a matter of ancillary or pendent jurisdiction or that instead might be remanded.' " *Foster v. Chesapeake Ins. Co.*, 933 F.2d at 1212-13 (quoting H.R. Rep. No. 889, 100th Cong., 2d Sess. 72 (1988)).

that, since Congress had not set any time limits for remand motions based on forum-selection clauses, this was a matter left to the discretion of the district courts. *Id.* at 1213 n.8. *See also Melahn v. Pennock Ins., Inc.*, 965 F.2d at 1502-03 (rejecting, as contrary to plain language, the Fifth Circuit's rule that all non-jurisdictional objections to removal involve removal "procedure" and refusing to apply thirty-day deadline to a remand motion based on abstention).[10]

This level of confusion in the application of key federal statutes plainly warrants a grant of review in this case. The specific issue raised here arises with great frequency. *See Perez v. General Packer, Inc.*, 790 F. Supp. at 1470 ("Experience has shown that cases pending over one year in the state courts are regularly removed . . . .").[11] Moreover, while this Court might ordinarily await the emergence of a direct inter-circuit conflict, the instant issue is one that is ordinarily resolved at the district-court level, without appellate review. Thus, while it is true that all of the recent decisions that have treated the statutory limits on removal as jurisdictional come from district courts, there is a simple reason for this: a remand ordered on this basis is unreviewable as a matter of law. 28 U.S.C. § 1447(d) ("An order remanding a case to the

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[10] As we have suggested, *see* pp. 12-13 *supra*, this Court might fairly conclude that Congress was equally silent as to the time requirements for remand motions based on statutory restrictions on removal jurisdiction—if it determines that these involve neither "defect[s] in removal procedure" nor "subject matter jurisdiction." The Fifth Circuit's approach, however, would pretermit this possibility because it categorically treats all removal challenges as "procedural" if they do not involve original jurisdiction.

[11] While this case involved a situation where counsel for plaintiffs were unaware of the changes made in the Judicial Improvements and Access to Justice Act, immediately after its passage, more recent cases make clear that the issue raised here is not merely a transitional problem. *See Brock v. Syntex Lab., Inc.*, *supra*; *Perez v. General Packer, Inc.*, *supra*; *McNaught v. Avis Rent a Car Systems, Inc.*, *supra*.

State court from which it was removed is not reviewable on appeal or otherwise . . . ."). *See Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723 (1977) (*per curiam*) (applying section 1447(d) to bar review of a remand ordered on jurisdictional grounds).[12]

In light of this fact, a circuit conflict could only conceivably arise if a district court outside the Fifth Circuit departed from the majority rule and denied a remand on facts like those presented here. Even then, of course, further review would only occur if the court proceeded to enter a litigated judgment (or some other appealable order) against the plaintiff, *see* 14A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3740, at 596-98 (1985), and if the plaintiff saw fit to proceed with an appeal.

In sum, it may be years before there is a second decision of a court of appeals addressing the question presented here. In the meantime, the district courts routinely will be faced with choosing between the Fifth Circuit's approach and the approach adopted by most other district courts.[13] This case provides the appropriate vehicle for eliminating a fundamental uncertainty that will otherwise continue to plague both courts and litigants alike.

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[12] We note that the Fifth Circuit has issued most of the appellate decisions applying the thirty-day deadline for remand motions in section 1447(c). One reason is that the Fifth Circuit has adopted a highly problematic interpretation of section 1447(d), allowing appeals from remand orders based on what it views as procedural defects raised after the deadline has passed. *See FDIC v. Loyd*, 955 F.2d at 319-21; *In re Shell Oil Co.*, 932 F.2d at 1520-21.

[13] In *Patient Care, Inc. v. Freeman, supra*, the court dealt with an equally unsettled issue—the availability of removal to third-party defendants—ultimately deciding to grant a remand. It noted that "part of the confusion is due to the silence of the appellate courts." 755 F. Supp. at 646, adding:

> The unfortunate but inevitable result of this [remand] decision is that it will be unreviewable by the Third Circuit. *See* 28 U.S.C. § 1447(d). As a consequence, rather than leading to a

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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resolution of this vexing issue, this case will only contribute to the cacophony of opinions which already exists.

Id. at 652.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 91-1351

MARK BARNES,
Plaintiff-Appellant,

v.

WESTINGHOUSE ELECTRIC CORPORATION, *et al.*,
Defendants-Appellees.

June 8, 1992

EMILIO M. GARZA, Circuit Judge:

During his work on a remodeling project at Dallas/Fort Worth Airport, Mark Barnes was injured after drilling into a high voltage bus duct which was part of the building's electrical system. Barnes filed this personal injury and product liability action in state court against Westinghouse—manufacturer of the bus duct—and others, alleging that their negligence caused his injuries. The case was subsequently removed to federal court, and the district court granted summary judgment for Westinghouse because Barnes did not file suit within the ten-year statute of repose. *See* TEX.CIV.PRAC. & REM. CODE ANN. § 16.009 (West 1986). Finding no error, we affirm.

I

Barnes, an employee of Trinity Contractors, was injured on June 15, 1984 when, during the course of a remodeling project, he drilled into a pre-existing electrical bus duct [1] manufactured by Westinghouse, and suffered, among other things, disfiguring burns to approximately seventy percent of his body. The bus duct which is the basis for Barnes' complaint was designed and manufactured by Westinghouse during 1972-73 for permanent installation into Dallas/Fort Worth airport, including the equipment room above American Airlines Terminal 3E, where Barnes was injured.[2]

Barnes filed his Original Petition against Westinghouse and others in state district court in Tarrant County, Texas, on July 23, 1985. Approximately four years later, on January 12, 1989, Westinghouse removed Barnes' suit to federal court alleging diversity jurisdiction under 28 U.S.C. § 1332. Barnes promptly moved to remand to state court, and the district court denied his motion.

Subsequently, Westinghouse filed a motion for summary judgment, asserting that Barnes' action was barred by the Texas ten-year statute of repose—limiting actions for liability resulting from "improvement[s]" to real

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[1] Bus duct is a metal-encased structure containing a number of rounded edge "bus bars" which transport electrical power in commercial buildings. The bus bars are enclosed within housing constructed of 14-guage and 16-guage steel. By transporting and distributing electricity throughout commercial buildings, the bus duct is meant to facilitate efficient power distribution.

[2] Specifically, the bus duct was a "POW-R-WAY" bus duct—that is, a duct specifically manufactured for permanent installation into particular structures according to design specifications submitted to Westinghouse. It was in conformity with the plans and specifications submitted by Ling Oliver O'Dywer Electric, Inc., the electrical subcontractor who installed the bus duct at the airport. The construction of improvements of Terminal 3E, including the installation of the bus duct, was substantially completed by January 31, 1974.

property to ten years from "substantial completion" of that improvement. TEX.CIV.PRAC. & REM.CODE ANN. § 16.009 (1986).[3] Approximately a year after his motion to remand was denied, Barnes filed a motion for rehearing. The district court denied Barnes' motion for rehearing, and granted Westinghouse's motion for summary judgment. Barnes appeals the judgment for Westinghouse, arguing that his motion to remand should have been granted and that summary judgment was improper because the bus duct was a component part of an improvement and, therefore, outside the state of repose.

II

A

Barnes argues that the district court erred in denying his motion for rehearing of his motion to remand on the grounds that the one-year limitation on removal contained in 28 U.S.C. § 1446(b)[4] is jurisdictional[5] and

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[3] The relevant portion of section 16.009 is quoted in its entirety *infra* at Part B.

[4] 28 U.S.C. § 1446(b) provides:

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

[5] Specifically, Barnes contends:

> "[T]hat the district court erred in denying his motion for rehearing of motion for remand because Westinghouse removed the suit to federal court over three years after the suit was filed in state district court in violation of the one year limitation on removal contained in section 1446(b), and the district court therefore lacked subject matter jurisdiction and should

thereby may be raised at any time prior to judgment pursuant to 28 U.S.C. § 1447(c)."[6] We disagree.

Barnes filed his Sixth Amended Original Petition—a petition naming for the first time completely diverse defendants—on December 16, 1988. Less than thirty days later, Westinghouse filed a petition for removal to the United States District Court for the Northern District of Texas. *See* 28 U.S.C. § 1441. Within thirty days of filing, Barnes filed a motion to remand, claiming that Westinghouse sought affirmative relief in the state district court after the case became removable, thereby waiving the opportunity to rightfully remove the case. The district court denied Barnes' motion to remand.

Over a year later, in September 1990, Barnes filed a motion for rehearing of his motion to remand. For the first time, Barnes argued that a case cannot be removed to federal court on the basis of diversity more than one year after commencement of the action. *See* 28 U.S.C. § 1446(b).[7] None of the parties dispute that Westing-

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have remanded the case to the 48th District Court of Tarrant County, Texas."

Brief for Appellant at 14, *Barnes v. Westinghouse Electric Corporation*, No. 91-1351 (5th Cir. filed June 17, 1991) ["Appellant's Brief"]. Barnes confuses removal jurisdiction with subject-matter or original jurisdiction. *See infra* notes 8-10 and accompanying text.

[6] 28 U.S.C. § 1447(c) provides in pertinent part:

> A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). . . . If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

[7] Pursuant to an amendment enacted November 19, 1988, section 1446(b) now states that a case may not be removed on the basis of jurisdiction conferred by section 1332 more than one year after commencement of the action. Section 1447(c) of Title 28 states that a motion to remand a case on the basis of a defect in removal

house removed the case more than one year after the commencement of the action. The district court, however, denied Barnes' motion for rehearing, reasoning that the removal procedures set forth at 28 U.S.C. §§ 1446(b) and 1447(c) were not jurisdictional. Therefore, the district court reasoned that if a case was in state court for over a year, and then removed pursuant to 28 U.S.C. § 1332, failure to comply with the thirty-day requirement imposed by section 1447(c) results in a waiver of a plaintiff's rights to object to removal defects resulting from noncompliance with section 1446(b). Because Barnes waited over twenty months to move for rehearing on his motion to remand, based on Westinghouse's failure to remove within one year of the original action, the district court found that Barnes had waived his right to object pursuant to section 1447(c).

We are not persuaded by Barnes's arguments that section 1446(b) is jurisdictional in nature, and therefore may be raised at any time. The language of the statute belies Barnes' contentions and indicates that sections 1446(b) and 1447(c) are procedural provisions.[8] As we stated in *Baris v. Sulpicio Lines*, "this court has had little difficulty in distinguishing between removal jurisdiction,[9] on the one hand, and original or subject matter

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procedure must be made within 30 days after the filing of the notice of removal under section 1446(a).

The amendments to sections 1446(b) and 1447(c) contain no effective date. Therefore, the effective date of these sections is the date the Act was enacted, which is November 19, 1988. *See In re Shell Oil Co.*, 932 F.2d 1523, 1526 (5th Cir.1991), *cert. denied*, —— U.S. ——, 112 S.Ct. 914, 116 L.Ed.2d 814 (1992) (effective date of amendment to section 1447(c) is November 19, 1988, and in most cases, it applies to cases pending on this date); *see also In re Shell Oil Co.*, 932 F.2d 1518 (5th Cir.1991) (companion case to *Shell, supra*); *Greer v. Skilcraft*, 704 F.Supp. 1570, 1582-83 (N.D.Ala. 1989) (en banc) (effective date of amendment to section 1446(b) is November 19, 1988, and it applies to cases pending on this date).

[8] *See supra* notes 4 and 6.

[9] *See* 28 U.S.C. § 1441 ("Actions removable generally").

jurisdiction,[10] on the other hand." *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1544 (5th Cir.), (footnote omitted) *cert. denied*, —— U.S. ——, 112 S.Ct. 430, 116 L.Ed.2d 449 (1991) (citations omitted); *see also In re Shell Oil Co.*, 932 F.2d 1518, 1522-23 (5th Cir.1991), *cert. denied*, —— U.S. ——, 112 S.Ct. 914, 116 L.Ed.2d 814 (1992) (noting that defects in removal procedure include all non-jurisdictional defects, and concluding that plaintiffs waived any non-jurisdictional grounds for remand existing at time of removal by not moving to remand within 30 days of notice of removal); *see also In re Shell Oil Co.*, 932 F.2d 1523 (5th Cir.1991) (companion case to *Shell, supra*).

We have noted that the word "procedural" in section 1447(c) refers to "any defect that does not go to the question of whether the case originally could have been brought in federal district court. . . ." *Baris*, 932 F.2d at 1544; *see also* H.R.REP. No. 100-889, 100th Cong., 2d Sess. 7 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6032-33 (noting 1988 changes to sections 1446(b) and 1447(c) and discussing removal procedure). This distinction between removal jurisdiction and subject matter jurisdiction is applicable to section 1446(b), which speaks of the removal of cases not more than one year after the commencement of the action. We previously have noted that "[t]he time limitation for removal is not jurisdictional; it is merely 'modal and formal and may be waived.'" *Nolan v. Boeing Co.*, 919 F.2d 1058, 1063 n. 6 (5th Cir.1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 1587, 113 L.Ed.2d 651 (1991) (citations omitted). Because Barnes did not move for rehearing on his motion to remand based on a procedural defect until approximately twenty months after Westinghouse's removal, we find that he waived his opportunity to call this procedural defect to the district court's attention.

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[10] *See, e.g.*, 28 U.S.C. §§ 1331 ("Federal question" jurisdiction) and 1332 ("Diversity of citizenship" jurisdiction).

B

Barnes also challenges the district court's conclusion that the bus duct was an improvement under section 16.009 of the Texas Civil Practice and Remedies Code, that no genuine issues of fact existed, and that Westinghouse was entitled to summary judgment as a matter of law. Barnes argues that the district court should not have granted Westinghouse's motion for summary judgment because the bus duct was merely a component part of an improvement and, therefore, outside the statute of repose. *See* TEX.CIV.PRAC. & REM.CODE ANN. § 16.009 (West 1986). We find Barnes' contentions without merit.

Section 16.009 provides in relevant part:

> (a) A claimant must bring suit for damages for a claim listed in Subsection (b) against a person who constructs or repairs an improvement to real property not later than 10 years after the substantial completion of the improvement in an action arising out of a defective or unsafe condition of the real property or a deficiency in the construction or repair of the improvement.

Id. The term improvement, set forth in section 16.009, has been held to include "all additions and betterments to the freehold." *Dubin v. Carrier Corp.*, 731 S.W.2d 651, 653 (Tex.App.—Houston [1st Dist.] 1987) (citation omitted), *appeal after remand*, 798 S.W.2d 1 (Tex. App.—Houston [14th Dist.] 1989, writ dism'd by agr.). An improvement can be anything that permanently enhances the value of the premises, and it can even be something easily removable provided that it is attached and intended to remain permanently as part of the building. *See Dedmon v. Stewart-Warner Corp.*, 950 F.2d 244, 247 (5th Cir.1992), *citing Ablin v. Morton Southwest Co.*, 802 S.W.2d 788, 791 (Tex.App.—San Antonio 1990, writ denied) and *Dubin I*, 731 S.W.2d at 654. However, manufacturers of component parts of an improvement do not come within section 16.009's statutory language.

See Conkle v. Builders Concrete Prods. Mfg. Co., 749 S.W.2d 489, 491 (Tex.1988) (citation omitted). And, a materialman who does no more than manufacture or supply materials does not benefit from—section 5536a, § 2, the predecessor statute to—section 16.009.[11] *Reddix v. Eaton Corp.*, 662 S.W.2d 720, 724 (Tex.App.—San Antonio 1983, writ ref'd n.r.e.) (citations omitted).

Barnes relies heavily on *Conkle* to support his argument that Westinghouse manufactured merely a component part of an improvement. In *Conkle* a worker at a concrete plant was killed when he got into a bin of a concrete batch plant to remove some objects that were trapped there. His parents sued Dillon Steel, the manufacturer of the concrete batch plant. The trial court granted summary judgment for Dillon Steel on the grounds that the Conkles' claim was barred by section 16.009, applicable to claims against persons who construct improvements to real property. The Texas Supreme Court held that summary judgment evidence raised fact issues whether the machinery in which Douglas died was an improvement to real property and whether Dillon Steel manufactured the entire unit or component parts only. The court emphasized that:

> Roy J. Dillon admitted that Dillon Steel did not manufacture or construct the mixer apparatus which is joined with the bins and hoppers to form a concrete batch plant. Thus, there was testimony that Dillon Steel had not manufactured the entire structure. Further, there was evidence that the plant is actually portable. The bins were first constructed at Dillon's plant and the moved to the batch plant's original location on the property of Lok Rok Corporation. It was only later that the plant was even placed on Builders' property.

Conkle, 749 S.W.2d at 491.

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[11] Tex.Rev.Civ.Stat.Ann. art. 5536a, § 2 (West Supp.1982-83) is codified as amended in § 16.009.

Barnes's reliance on *Conkle* is misplaced. Section 16.009 requires only that the item in question be "an improvement to real property." *See Rodarte v. Carrier Corp.*, 786 S.W.2d 94, 95 (Tex.App.—El Paso 1990, writ dism'd).[12] As the district court noted in this case, the bus duct was permanently affixed within the structure of Terminal 3E as part of an overall electrical system affixed to the terminal.[13] Westinghouse manufactured the bus duct for permanent installation into the terminal. Thus, the bus duct was an addition and betterment to

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[12] In *Rodarte*, the court held that heater-air conditioner unit which had electrocuted Rodarte was an improvement to real property. The *Rodarte* court noted the unit was permanently connected to the premises by its connection to the duct work and that it was blocked into a corner of a building by other units which were permanently attached to the structure. Thus, Carrier Corporation was a manufacturer of an "improvement to real property." Because the unit was manufactured and installed more than ten years before the suit was filed, the court held that the wrongful death suit barred by section 16.009.

[13] Barnes points to the testimony of Dr. Gary Richetto, a Westinghouse expert, to support his contention that the bus duct "is merely a component of the improvement in question." Appellant's Brief at 16. Dr. Richetto testified that he believed the various sections of busway were individual component parts of an overall electrical system. We do not find his assertions persuasive or enough to defeat summary judgment, because Westinghouse manufactured the entire bus duct system—an improvement to real property. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986) (mere evidence of a scintilla of evidence in support of plaintiff's position is insufficient to defeat summary judgment). And, as Westinghouse indicates, Dr. Richetto apparently did not examine the bus duct, but based his testimony upon a review of literature concerning the product.

Barnes also asserts that Westinghouse did not install the bus duct, and Westinghouse concedes this fact in its brief. This point will not defeat summary judgment. *See Ellerbe v. Otis Elevator Co.*, 618 S.W.2d 870, 872 (Tex.Civ.App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.) (manufacturer of elevator would be a person performing or furnishing construction of the elevator, even though it did not install it in the building).

the freehold of Terminal 3E. *Id.* Barnes' argument that Westinghouse was the mere manufacturer of component parts is not persuasive because Westinghouse manufactured the entire bus duct system. *See Dubin v. Carrier Corp.*, 798 S.W.2d 1, 2 (Tex.App.—Houston [14th Dist.] 1990, writ dism'd by agr.) (defendant Williams, responsible for manufacturing and designing wall heater unit, is entitled to statutory protection under section 16.009 because Williams both made a portion of the unit and also manufactured the entire assembly). Westinghouse, as an entity that constructed an improvement within the meaning of section 16.009, is not a mere manufacturer of component parts and is, therefore, entitled to repose under section 16.009.

III

Accordingly, we AFFIRM.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. 4-89-44-E

MARK BARNES

vs.

WESTINGHOUSE ELECTRIC CORPORATION, WESTINGHOUSE ELECTRIC SUPPLY COMPANY and/or WESCO DALLAS and/or WESCO, a division of or wholly-owned subsidiary of WESTINGHOUSE ELECTRIC CORPORATION

MEMORANDUM OPINION AND ORDER

[Filed Feb. 8, 1991]

The Court now considers defendant's motion for summary judgment and plaintiff's response thereto. After a thorough review of the issues and applicable law, the Court makes the following determination.

FACTUAL SUMMARY

Plaintiff, Mark Barnes, originally brought this action in the 48th Judicial District Court of Tarrant County, Texas, and said action was subsequently removed to this Court following the dismissal of all non-diverse defendants in the state court proceeding. The Court, therefore, has jurisdiction over this cause pursuant to 28 U.S.C. § 1332.

In summary, plaintiff alleges that while he was working at D/FW Airport in Terminal 3E, he attempted to drill into a structure that he allegedly believed to be ordinary I-beam, which in fact was electrical busway.

Plaintiff contends that as a result of the lack of warning, he drilled into the busway whereby he sustained severe electrical burns and injuries. In plaintiff's sixth amended original petition, plaintiff asserts the following:

(1) that Westinghouse[1] failed to affix proper and adequate warnings to the subject bus duct;

(2) that Westinghouse breached express and/or implied warranties applicable to the subject bus duct;

(3) strict products liability with respect to the design, manufacture, and construction of the subject bus duct; and

(4) general allegations of negligence with respect to the design, manufacture, and construction of the subject bus duct.

The parties stipulate that the plaintiff was an employee of Trinity Contractors and was at work in the course and scope of his employment for such employer at the time of the accident in question on or about June 15, 1984. The parties further stipulate that the section of busway or bus duct involved in the accident on or about June 15, 1984 was designed, manufactured, and marketed by the Westinghouse Electric Corporation.

The following facts are undisputed:

The bus duct described in plaintiff's sixth amended original petition is located in the machine room above Terminal 3E and was manufactured by Westinghouse

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[1] Westinghouse Electric Supply Company, also referred to as "WESCO' in plaintiff's sixth amended original petition, is an unincorporated business unit of Westinghouse Electric Corporation. Additionally, "WESCO DALLAS," as named in plaintiff's sixth amended original petition, is a branch office of Westinghouse Electric Supply Company. Neither WESCO Dallas nor Westinghouse Electric Supply Company are independent corporate entities. Thus, each of the claims asserted in plaintiff's sixth amended original petition are claims against Westinghouse Electric Corporation.

during 1972-1973. The installation of the bus duct was substantially completed by Ling Oliver O'Dwyer Electric, Inc., on or prior to January 31, 1974, which is in excess of ten years prior to the initiation of this action.

DISCUSSION

Defendant Westinghouse claims that plaintiff's lawsuit is barred by the Texas Statute of Repose which is codified at Texas Civil Practice & Remedies Code § 16.009. Section 16.009 provides, in relevant part, as follows:

> (a) A claimant must bring suit for damages for a claim listed in Subsection (b) against a person who constructs or repairs an improvement to real property not later than ten (10) years after the substantial completion of the improvement in an action arising out of a defective or unsafe condition of the real property or a deficiency in the construction or repair of the improvement.

In its motion for summary judgment, Westinghouse relies on *Rodarte v. Carrier Corporation*, 786 S.W.2d 94 (Tex. App.—El Paso 1990, n.w.h.) for the proposition that manufacturers of products affixed to realty are persons who construct or repair improvements to real property, within the meaning of the Statute of Repose. In *Rodarte*, the plaintiff was attempting to repair a heater/air conditioning unit, designed, manufactured and marketed by the Carrier Corporation. In the process, plaintiff was electrocuted and his heirs brought suit for wrongful death alleging that "design and marketing defects were the producing cause of his death." *Id.* at 95. There was no dispute that the unit had been manufactured and installed more than 10 years before the suit was filed. In its defense, Carrier relied upon the Statute of Repose.

The plaintiff in *Rodarte* argued that the statute should not apply to Carrier because Carrier was a manufacturer and not the installer or servicer of the unit. The plaintiff

also argued that the unit was merely a "component part of a greater system and was not in itself an improvement." The Court, however, rejected plaintiff's arguments stating: "[t]he statute only requires that the particular item in question be "'an improvement to real property.'" Referring to *Dubin v. Carrier Corporation*, 731 S.W.2d 651 (Tex. App.—Houston [1st Dist.] 1987, no writ), the Court in *Rodarte*, reiterated that an "improvement" comprehends all additions and betterments to the freehold. *Rodarte* 786 S.W.2d at 95.

Describing the subject heating/cooling unit, the Court in *Rodarte* stated that "[it] is permanently connected to the premises by its connection to the duct work and is blocked into a corner of a building by other units which are permanently attached to the structure." *Id.* at 96. In the case at bar, the Court finds from the evidence before the Court, as established in the uncontroverted affidavits of James L. Mertz and Robert G. Towne, that the bus duct was an improvement as contemplated by Section 16.009. Stated differently, the bus duct in question was an addition and betterment to the freehold of Terminal 3E. See *Dubin v. Carrier Corporation*, 731 S.W.2d 651. In the aforementioned affidavits, both Mertz and Towne state that the bus duct was "permanently affixed within the structure housing Terminal 3E." The Court finds that the bus duct, though part of an overall electrical system, was permanently affixed to the system and became an improvement to real property. Plaintiff provides no controverting evidence that the bus duct is not an improvement. Plaintiff merely argues that the bus duct should be considered a component part to the overall electrical system and should therefore not be entitled to protection under Section 16.009. The Court, however, finds pursuant to *Rodarte*, that the distinction between component parts are not important for the Court's determination of whether the instant bus duct is an improvement to real property under 16.009.

Plaintiff's alternative argument is that Section 16.009 does not operate to exclude those causes of actions which are premised on inadequate warning and defective design. Although it stated in dicta, the Court in *Rodarte*, specifically addressed this issue. There the Court stated that the "statute applies to an action arising out of a defective or unsafe condition in the construction of the unit and all of the claims against the manufacturer fall within those provisions of the statute." *Id.* The plaintiff correctly points out that this Court need not follow opinions of intermediate appellate courts when the federal district court has reason to believe that the highest appellate court of the state in which it sits would decide the issue at hand differently than previously decided by the intermediate appellate courts. *See Farina v. Southwestern Bell Media Inc.*, 658 F. Supp. 826, 828 n.1 (S.D. Tex. 1987). In *Farina*, the Court stated in note 1 that the "Federal Courts are not bound by the rulings of intermediate Texas appeals courts but must make an *Erie*-guess and rule as they believe that the Texas Supreme Court would rule. *Id.* In light of *Farina*, the Court finds that it is reasonable to believe that the Texas Supreme Court would fashion relief in the same manner as the court in *Rodarte*.

In summary, the Court finds that the bus duct is an improvement under Section 16.009 of the Texas Civil Practice and Remedies Code. The Court further finds that actions brought against manufacturers for alleged violations of inadequate warning and defective design are contemplated by the application of Section 16.009. The Court further finds that there exists no genuine issue of material fact and summary judgment is therefore appropriate. Accordingly, the Court GRANTS defendant's motion for summary judgment as to all claims asserted by plaintiff against defendant Westinghouse and its wholly owned subsidiaries. Plaintiff shall take nothing by this lawsuit and each party shall bear their own

costs. A judgment consistent with this opinion will be executed herewith.

Signed this 7th day of February, 1991.

/s/ Eldon B. Mahon
ELDON B. MAHON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. 4-89-44-E

MARK BARNES

vs.

WESTINGHOUSE ELECTRIC CORPORATION, WESTINGHOUSE ELECTRIC SUPPLY COMPANY and/or WESCO DALLAS and/or WESCO, a division of or wholly-owned subsidiary of WESTINGHOUSE ELECTRIC CORPORATION

JUDGMENT

[Filed Feb. 8, 1991]

This action came on for decision on defendants' motion for summary judgment before the Court, Honorable Eldon B. Mahon, U.S. District Judge, presiding, and the issues having been duly considered and an opinion having been rendered, it is ORDERED and ADJUDGED that plaintiff take nothing by his lawsuit and that the parties bear their own costs of action.

Signed this 7th day of February, 1991.

/s/ Eldon B. Mahon
ELDON B. MAHON
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. 4-89-44-E

MARK BARNES

vs.

WESTINGHOUSE ELECTRIC CORPORATION, WESTINGHOUSE ELECTRIC SUPPLY COMPANY and/or WESCO DALLAS and/or WESCO, a division of or wholly-owned subsidiary of WESTINGHOUSE ELECTRIC CORPORATION

ORDER

[Filed Nov. 21, 1990]

The Court now considers plaintiff Mark Barnes' motion for rehearing on motion to remand to which the defendants Westinghouse Electric Corporation, Westinghouse Electric Supply Company, Wesco Dallas, and Wesco, a division of or wholly-owned subsidiary of Westinghouse Electric Company, have responded. After a thorough review of the issues and applicable law, the Court makes the following determination.

This case was originally filed in the 48th Judicial District Court of Tarrant County, Texas in 1985. In his original petitions in state court, plaintiff sued various non-diverse defendants. In December 1988 all non-diverse defendants were dismissed from the lawsuit and plaintiff filed his sixth amended petition which created diversity

of citizenship for the first time. On or about January 12, 1989, Westinghouse removed the above-captioned cause to this Court. Thereafter, on January 25, 1989, plaintiff filed his motion for remand, which is the subject of the plaintiff's instant motion for rehearing filed on September 21, 1990.

In his motion for rehearing, plaintiff argues that this Court lacks subject matter jurisdiction over this cause as a result of the removal statute set out in the Judicial Improvements and Access to Justice Act, Public Law No. 100-702, 102 Stat. 4642, which is found in the amended 28 U.S.C. § 1446(B). Defendants argue that the amended removal statute does not create a jurisdictional requisite, but rather a procedural one. Defendants further argue that the plaintiff waived his right to assert the procedural defect when plaintiff waited some 20 months to file this instant motion to remand.

1988 AMENDMENT-SECTION 1446(b)

Prior to the 1988 amendment, Section 1446(b) provided for removal within 30 days after receipt by the defendant of an amended pleading or other paper that gave defendant notice that the case is removable. Therefore, removal under the previous statute could occur at any time as long as there existed a basis for removal. The amendment in 1988 to Section 1446(b), however, limited a party's right to removal of those actions whose jurisdiction is based solely on diversity. As amended by the 1988 Act, 28 U.S.C. § 1446(b) reads (in pertinent part with emphasis supplied):

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, *except that a case may not*

> *be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.*

Plaintiff argues that the new 1 year limitation acts as a non-waivable jurisdictional bar. In support of his proposition, plaintiff cites to *Foiles By Foiles v. Merrell Nat. Laboratories*, 730 F. Supp. 108 (N.D.Ill. 1989). In *Foiles*, the case was removed on June 22, 1988 following the dismissal of the non-diverse defendants, and the plaintiff filed for remand on August 25, 1989, some 60 days later. Notwithstanding the plaintiff's failure to argue that the new amendment created jurisdictional limitations, the *Foiles* court held that the 1 year limitation is a jurisdictional one and remanded the case to state court.

At opposite with the holding in *Foiles* is the holding in *Leidolf By Warshafsky v. Eli Lilly and Co., Inc.*, 728 F. Supp. 1383 (E.D.Wis. 1990). In *Leidolf*, the court specifically found that the removal defects arising from § 1446(b) are procedural and not jurisdictional. The *Leidolf* court noted that where a case is improperly removed under 1446(b), the plaintiff may waive his right to remand if he fails to comply with the 30 day provision of § 1447(c). As amended by the 1988 Act, 28 U.S.C. § 1447(c) reads in pertinent part as follows:

> (c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a).

Explaining its analysis, the court in *Leidolf* cited to *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209 (9th Cir. 1980, where the court stated that "[t]he statutory time limit for removal petitions is merely a formal and modal requirement and is not jurisdictional." [1]

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[1] *See also Gray v. Moore Business Forms, Inc.*, 711 F. Supp. 543 (N.D.Cal. 1989). *See generally Wilson v. General Motors Corp.*, 888 F.2d 779 (11th Cir. 1989).

Having no binding authority on this issue, this Court must make its determination from analogy to the removal procedures prior to the 1988 amendment. The majority of the cases involving removal prior to the 1988 amendment agree that the removal procedure restrictions and limitations are procedural in nature and do not create jurisdictional requisites.[2] Therefore, this Court finds that the 1988 amendment to § 1446(b) does not create a jurisdictional requirement barring all actions in the district court where the case was removed pursuant to § 1332 and remained in state court for over one year. Failure to comply with the 30 day requirement imposed by § 1447(c) creates a waiver of the plaintiff's rights to object to any removal defects brought upon by defendant's failure to comply with § 1446(b).

Defendants, however, do not have clean hands in this case. At the time of removal, defendants removed this cause contrary to the newly established removal procedures under § 1446(b). On the other hand, plaintiff waited nearly 20 months to bring this motion to rehear plaintiff's motion to remand. Plaintiff's instant motion, however, is not a "rehearing," but rather a new motion to remand, stating new reasons why this Court should remand this cause to state court.[3] The Court has reviewed its previous ruling on plaintiff's original motion to remand and finds no error.

Plaintiff's hands are likewise dirty as a result of failing to assert the proper grounds for remand in January 1989 and then waiting 20 months to bring this renewed motion to remand. Since the determination of plaintiff's original motion to remand in February 1989, both parties have

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[2] *See Lirette v. N.L. Sperry Sun, Inc.*, 820 F.2d 116 (5th Cir. 1987); *Grubbs v. General Electric Corp.*, 405 U.S. 699 (1972).

[3] In his original motion to remand, plaintiff argued that because the defendants took advantage of the state forum for some three and one half years, defendants should be barred from removing the cause to the federal court on the eve of trial.

engaged in extensive preparation of this lawsuit. Defendants filed a motion for summary judgment on June 7, 1990 and plaintiff responded. The Court held a pretrial conference on July 16, 1990 on this cause and heard informal arguments on defendants' motion for summary judgment. The final reply on the motion for summary judgment was filed on July 27, 1990. It was not until the Court began to deliberate on defendants' motion for summary judgment that plaintiff renewed his motion to remand. Plaintiff argues that neither party had the benefit of the amendment to § 1446(b) as it had not made its way into the libraries of the respective law firms. While this is probably true, the Court cannot enforce rules and laws only upon those that have read them. Once the amendment became enacted, all parties were given notice. While defendants had notice of the amendment, plaintiff's failure to comply with § 1447(c) prevents this Court from curing such defect. The removal defect is not a jurisdictional defect, and because this Court would have had jurisdiction over this matter had it been originally filed in this Court, the Court must deny plaintiff's renewed motion to remand.

Accordingly, the Court DENIES plaintiff's motion for rehearing on motion to remand. Since the Court stayed its ruling on defendants' motion for summary judgment and said motion is now ripe for ruling, an opinion will be forthcoming.

Signed this 20th day of November, 1990.

/s/ Eldon B. Mahon
ELDON B. MAHON
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. 4-89-44-E

MARK BARNES

vs.

WESTINGHOUSE ELECTRIC CORPORATION, *et al.*

ORDER

[Filed Feb. 10, 1989]

The Court has agreed to consider Plaintiff Mark Barnes' petition for removal on an expedited basis. The petition was joined on February 6, 1989, and the matter is ripe for resolution.

Based on the removal record developed in this cause, the Court finds that Defendant Westinghouse Electric Corporation timely removed this action from state court when the last nondiverse defendant was dismissed and complete diversity of citizenship was created between the remaining plaintiff and defendant. After diversity was complete, Westinghouse removed this action within the 30 day period prescribed by the removal statute, title 28, section 1446 of the United States Code.

Prior to the time this action became removable, a joint motion was filed by the defendants, including Westinghouse, in state court for an independent medical examination of Plaintiff Barnes. Barnes countered in state

court with a motion for protective order. After this case became removable, a hearing was held in the state court on the plaintiff's motion for protective order and Westinghouse's request for an independent medical examination. Westinghouse's appearance at this discovery hearing was preliminary in nature. Nothing in the record before this Court indicates that Westinghouse's appearance at the discovery hearing constituted a waiver of Westinghouse's right to remove or an agreement on the part of Westinghouse to submit the merits of case to the state court for a determination. Short of proceeding to an adjudication of the case on its merits, defensive actions in state court do not waive the defendant's right to remove. *See, e.g., Gore v. Stenson*, 616 F. Supp. 895, 897-98 (S.D. 1984) ("An intent to waive the right to remove . . . must be clear and unequivocal, and the waiving party's action must be inconsistent with his right to remove.").

Accordingly, Plaintiff Barnes' motion to remand is DENIED.

Signed this 9th day of February, 1989.

/s/ Eldon B. Mahon
ELDON B. MAHON
United States District Judge

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-1351

MARK BARNES,
Plaintiff-Appellant,

versus

WESTINGHOUSE ELECTRIC CORPORATION, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion 6/8/92, 5 Cir., 1992)

(Filed July 8, 1992)

Before DAVIS, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Emilio M. Garza
United States Circuit Judge